Petition

81-1094

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

JOHN FRANCIS KRETCHMAR and FRANK RICHARD SLEYKO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether defendants were denied due process of law, per principles set out in *In Re Winship*, 397 U.S. 358, and *Jackson* v. *Virginia*, 443 U.S. 307, by being convicted upon evidence which was insufficient, as a matter of law, to sustain the conviction of either defendant on either count:

   A. As to Count 1 (possession with intent to distribute): whether the government's continuous exercise of control over the marijuana—which the government supplied—negates "possession" of the substance by either defendant.

   B. As to Count 2 (conspiracy): where both Wright and Miller were government agents—so that there can be no conspiracy except upon proof that defendants conspired with one another—whether the evidence connects Sleyko with any conspiracy.

2. Whether defendants were deprived of their Sixth Amendment and due process right to have the jury instructed on their theory of the case, where, upon evidence presenting (at best) a close factual situation concerning whether defendants ever "possessed" the marijuana—considering the continuous degree of government control—the court refused to instruct, per defense request, as to defendants' theory of the case, with respect to possession.

3. Whether the trial court should have dismissed the indictment, in the exercise of its supervisory power to deter the flouting of court orders, on grounds a principal government witness, one, Patrick Wright, was in violation of his probation by participating with the DEA in Florida.

4. Whether the trial court should have dismissed the indictment on grounds the statutes [21 U.S.C. secs. 841(a)(1) & 846] as applied to the facts are unconstitutional, in that there is no proper basis for federal jurisdiction.

5. Does the Court of Appeals' decision—resolving all the foregoing serious and viable issues against defendants without opinion—deprive defendants of their right to meaningful appellate review?

Parties Involved*

Petitioners, John Francis Kretchmar and Frank Richard Sleyko, were the defendants in the United States District Court for the Middle District of Florida, Tampa Division, and the appellants in the United States Court of Appeals for the Fifth Circuit. Respondent, the United States of America, was the prosecution (plaintiff) in the trial court and the appellee in the Court of Appeals.

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* Per Rule 21.1(b)

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3. The decision below, by affirming the trial court's order denying defendants' motion to dismiss the indictment in the exercise of its supervisory powers to deter the flouting of court orders, approves a conviction based on testimony of a principal government witness who was in violation of his probation by participating with the DEA in Florida. Certiorari should be allowed so that this Court may exercise its supervisory powers in the spirit of principles of the *Olmstead* dissents, 277 U.S. 438, 470, 485, adopted in *McNabb* v. *United States*, 318 U.S. 332 and reiterated in such cases as *Elkins* v. *United States*, 364 U.S. 206, 222, concerning "the imperative of judicial integrity," to maintain proper respect for the judicial system 24

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, John Francis Kretchmar and Frank Richard Sleyko, (hereafter, defendants) respectfully pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Fifth Circuit, to review its decision affirming their convictions.

Judgment and Order Below

The Order of the Court of Appeals for the Fifth Circuit, No. 81-5245, affirming (without opinion) per Circuit Rule 25, is set out as Appendix A, per Rule 21.1(k)(i) of this Court.

Jurisdictional Statement

On October 28, 1981 the Court of Appeals for the Fifth Circuit entered its Order affirming defendants' convictions. (App. A) No petition for rehearing was filed. This petition to review the judgment in a criminal case of a federal court of appeals is timely filed within 60 days after entry of judgment. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 20.1 of this Court.

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides, in part:

> "No person shall be . . . deprived of . . . liberty . . . without due process of law; . . . ."

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .; . . . to have compulsory process for obtaining witnesses in his favor . . . ."

The Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Title 21, United States Code, sec. 841(a)(1) provides, in pertinent part:

> "§ 841. *Prohibited acts A—Unlawful acts*
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to . . . possess with intent to . . . distribute . . . a controlled substance;"

Title 21, United States Code, sec. 846 provides:

"§ 846. *Attempt and Conspiracy*

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE

Nature of the Case

Defendants, John Francis Kretchmar and Frank Richard Sleyko, were charged in a 3-count indictment, (No. 80-92-Cr.T.H.) as follows: Count 1 charged both defendants with possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1); Count 2 charged both defendants with conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846; and Count 3 charged Sleyko alone with possession of one gram of cocaine. (R. 6-7)[1]

Defendants' motion to dismiss Counts 1 and 2 for lack of federal jurisdiction (R. 19) was denied, (R. 47), as was their motion to dismiss Count 2 for failure to allege an

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[1] "R." refers to the Record on Appeal, and "Tr." to the Transcript of Proceedings (consisting of 3 volumes, consecutively paginated).

Kretchmar's motion to sever count 3 (R. 21) eventually was allowed (R. 55) after initially having been denied. (R. 47). See Tr. 128-41; 155. No further reference will be made to Count 3, and the evidence adduced on this charge before the severance was allowed will be ignored.

overt act. (R. 51, Tr. 2-3) Defendants' motions for acquittal at the close of the government's case (R. 48, Tr. 239) and at the close of all the evidence (R. 53, Tr. 257-58) were denied. (R. 71) Defendants' motion to dismiss the indictment pursuant to the court's supervisory power, on grounds a government witness violated his probation by "cooperating" with the DEA against court order, (R. 63), was also denied. (R. 71)

The court refused defendants' tendered instructions as to specific intent and possession. (R. 54; Tr. 269-70)

The jury found both defendants guilty as charged in Counts 1 and 2, (R. 56-57), and the court sentenced each defendant to 3 years on each of counts 1 and 2, to be served concurrently, with a Special Parole term of 5 years as to each count. (R. 72-73)

Jurisdiction of Trial Court

Jurisdiction in the court of first instance is based upon 18 U.S.C. 3231, which provides in part that "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." Defendants here were charged with having committed offenses against the laws of the United States, to wit, 21 U.S.C. secs. 841(a)(1) and 846.

STATEMENT OF FACTS

Patrick Wright, an undercover informant,[2] testified for the government that in mid-July, 1980 John Kretchmar told him he might be needing to buy marijuana in the near future. (Tr. 32-33) Wright discussed Kretchmar's request with DEA Agent Karst, (Tr. 34), and later that day had a phone conversation with Kretchmar. Wright negotiated with Kretchmar for the purchase of marijuana and Kretchmar said he would have about $60,000.00 in the near future for 250 pounds at about $240 per pound. (Tr. 36-37) Pursuant to the agents' instructions, Wright induced Kretchmar to come to Florida on August 2, 1980. (Tr. 37-39, 41

They drove to Tampa, Florida to a TraveLodge. (Tr. 41) From the TraveLodge, Wright telephoned Miller. After driving Kretchmar to the airport where he was to rent a car, Wright met with D.E.A. agents Miller and Wehrly; they placed a bale of marijuana in the trunk of the Oldsmobile Wright was driving. (Tr. 43) Then, in the TraveLodge lounge, Agent Miller was introduced by Wright to Kretchmar as "Buck Miller," a pilot and drug smuggler. (Tr. 44-45) Miller and Kretchmar went out for about a half hour and returned. Wright drove Miller back to the parking lot (where they had earlier placed the bale in the Oldsmobile), and the agents removed the bale. (Tr. 45)

Wright testified that Kretchmar said that "Frank" was the person who was going to drive the other car back to Chicago. Kretchmar said he had to pick Frank up at the airport; he left the TraveLodge around midnight, returning about 2:30 a.m. (Tr. 46) with Frank Sleyko. (Tr. 47)

The next morning Kretchmar met with Miller in the hotel room. (Tr. 48) Wright and Sleyko were there also.

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[2] Wright's criminal history is set out at Tr. 51; see p. 6, *infra*.

Wright testified he saw Kretchmar give Miller the money; thereafter, Miller gave the keys to Sleyko and left. Sleyko left first and went down to the car. Kretchmar gave Wright $3500, less $50 for expenses. They then went to the parking lot. (Tr. 50)

Wright had been convicted of possession of cocaine in Utah on a plea of guilty in 1978, and also was convicted of manufacturing cocaine, receiving 5 years probation from the federal court in Chicago in 1979. (Tr. 51) He started "working" for the government at about the time of the 1979 conviction, prior to sentencing in that case. Wright received $2,000.00 for his "cooperation" in this case. (Tr. 51)

On cross-examination, Wright said that in addition to the $2,000.00 he made in this case, he had received an additional $1450 from the DEA for other cases. (Tr. 55) His 3-year probationary period on the Utah state offense was terminated early. (Tr. 60-61) At all times in connection with his activities with Kretchmar in late July and August, 1980, all his activities were under the direction and supervision of the federal DEA agents. (Tr. 75)

DEA Agent Lowell Miller testified he told Wright to contact Kretchmar to tell him that the marijuana transaction could take place within the next week to ten days after July 24, 1980. The government was "preparing for what we referred to as a reverse undercover operation." (Tr. 79) Miller saw Wright in Tampa on August 2, 1980, in the parking lot of a shopping center. (Tr. 81) A bale of marijuana was transferred from Miller's car to Wright's car. They went to the TraveLodge lounge, where he met Kretchmar. (Tr. 82) Kretchmar told Miller he had approximately $60,000, and that he had been quoted a price of $240 per pound. Miller said Kretchmar said that if he

decided to go through with the transaction, he had another individual in Chicago who would be coming down, bringing the money and driving the marijuana back. (Tr. 83)

Kretchmar and Miller went out to see the sample bale in Wright's car, while Wright remained in the lounge. Miller opened the trunk of the car, which contained a bale of marijuana. Kretchmar slit the paper and removed a small sample which he put in an envelope he placed in his pocket. (Tr. 84)

Miller told Kretchmar the transaction would be done the following day. (Tr. 86-87)

The next morning, August 3, 1980, Miller went to Room 201, TraveLodge, about 11:00 a.m. Wright, Kretchmar and Sleyko were there. Sleyko was introduced by Kretchmar to Miller as the man who would be driving the car back to Chicago. (Tr. 89) Miller and Kretchmar together walked down to the motel parking lot. Kretchmar showed him a gray Omega with Illinois plates, and gave Miller the keys, with which to take the car and put the marijuana in the trunk. He said there was a green blanket in the back of the car with which to cover the marijuana. (Tr. 89) Miller drove the Omega back to the DEA office; he put five bales in the trunk and one in the back seat, for a total of 234 pounds. (Tr. 90) He then drove the Omega back to the TraveLodge parking lot.

He saw Sleyko walking towards him in the lot. Miller and Sleyko walked back to the car; Miller opened the trunk and showed Kretchmar that the marijuana was in the trunk, and also explained about the one bale being in the back seat due to lack of space in the trunk. (Tr. 90) Miller gave Kretchmar a list of the bales with corresponding weights. (Tr. 90, 92)

Back in the room, Miller told Kretchmar he owed Miller for 230 pounds, that is, $55,200. (Tr. 91) Kretchmar counted out $55,200 in one-hundred dollar bills and gave it to Miller. (Tr. 91-92)

Miller gave Sleyko the keys to the Omega and left the motel with the money, followed by Sleyko who had a suitcase in his hand. (Tr. 93) Miller went downstairs to a vehicle with another DEA agent, and they left the area. When he returned some 30-45 minutes later, Kretchmar and Sleyko had been arrested. (Tr. 93)

Miller described the parking lot; there were two exits—both of which were covered by members of Miller's surveillance team—and no other way out of the parking lot, where the Omega was parked at the point Sleyko received the keys from Miller. (Tr. 97) There was a 10-foot high fence all the way around the parking lot. (Tr. 97) 234 pounds of marijuana were recovered from the Omega. (Tr. 99)

On cross-examination, Miller testified that he wanted to put off the transaction from the night of August 2 to the morning of August 3, because he needed "sufficient surveillance agents." (Tr. 101) They would need 8 to 10 people on the street because they weren't about to let Kretchmar get away with 234 pounds of marijuana. (Tr. 101) In addition to the DEA agents, there also was a marked squad car with two uniformed Tampa police officers. (Tr. 102) There were agents covering both exits from which a car could leave the motel parking lot. (Tr. 104)

> "Q. You never intended to let that 230 pounds or 234 pounds of marijuana get out of your control, did you?—Even if you had the money; isn't that true?
>
> A. As far as my control, we had no intentions of letting anybody take that car that it was in and leaving with it, no, sir." (Tr. 105-06)

Tampa police officer, Gary S. Pricher, testified that on August 3, 1980, he and his partner (Officer Foster) received a radio message to go to the DEA office. There, an agent, whose name he could not recall, sent them to a location off Fowler Avenue. "According to them, the vehicle that they wanted us to stop would be at the TraveLodge. They would give us the signal as to when to go in and stop the vehicle." (Tr. 110) Pricher had seen the car at the DEA office earlier when it was being loaded. The DEA agents arranged to signal the Tampa officers by DEA walkie-talkie, deciding to make the arrest in the hotel parking lot. (Tr. 111) They received the message over the walkie-talkie the DEA had furnished for their squad car, and drove into the front entrance of the parking lot while the car was traveling in a northerly direction toward the exit of the hotel parking lot. (Tr. 111) They stopped the car "nose to nose," with the red and blue lights going on the marked car. Pricher and Foster identified themselves as police officers and ordered the driver to exit the vehicle The driver put the car in reverse and started backing the car up in a southerly direction, backing into another DEA car coming around the corner of the hotel. (Tr. 112) After the Olds ran into the DEA car, the agent jumped out of the car; there were agents running (Tr. 112) to the car, and they removed the driver of the car. (Tr. 112)

On cross-examination, Pricher testified that it took about 30 seconds from the time he received the instructions on the walkie-talkie until he arrived at the entrance to the TraveLodge parking lot. (Tr. 116) The car they were to stop was still in the parking lot when the police vehicle moved into the parking area. (Tr. 117)

DEA agent James H. Baggett, Jr. assisted in the arrest of Sleyko on August 3, 1980. He was the driver of the car that Sleyko backed into when he went into reverse upon confrontation with the Tampa squad car. (Tr. 157)

On cross-examination, Baggett testified that the car Sleyko was driving had been placed in its position by Miller before Sleyko got in to drive it; Miller parked it in the far corner of the lot. (Tr. 163)

Specific Facts Relative To Points Raised Herein

Facts re "possession"

The agents and police were at all times in control of the area, the car and its contents. (Tr. 43-45; 48; 79-82; 84; 88-93; 101-02; 104-06; 110; 112; 157; 163) See evidence outlined at pp. 5-10, *supra*. More specifically:

> Q. [By defense counsel]: You never intended to let that 230 pounds or 234 pounds get out of your control, did you?—Even if you had the money, isn't that true?
>
> A. [Agent Miller]: As far as my control, we had no intentions of letting anybody take that car that it was in and leaving with it, no sir." (Tr. 105-06)

Miller testified they would need 8 to 10 surveillance agents on the street because they weren't about to let Kretchmar get away with 234 pounds of marijuana. (Tr. 101) All exits were covered from the TraveLodge parking lot; with a 10-foot-high fence all the way around, there was no way out. (Tr. 97)

Facts re "conspiracy"

The evidence respecting the alleged conspiracy is set out at pp. 5-8, *supra*. More specifically:

The trial court agreed with the defense that no government agent, overt or covert, could be a conspirator. (Tr. 32; Def. Inst. C, given by the court, Tr. 335; see cases at p. 18, *infra*.) Eliminating Wright and Miller, both government agents, the only possible remaining conspirators are the two defendants.[3]

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[3] See footnote 5, p. 18, *infra*.

Sleyko flew from Chicago to Tampa under a fictitious name, (Tr. 218), and agent Miller testified he showed Sleyko bales in the car. (Tr. 90) The bales were not open—Kretchmar had had to slit one open to obtain the sample (Tr. 84)—and there is no evidence that Sleyko ever knew what was in the bales in the car. The bales were contained within opaque brown or black plastic bags. (Tr. 244) There is no hard evidence that Sleyko was aware that the money was passed. (See Tr. 245-46.) What Miller said is that Sleyko was in the room when Kretchmar gave Miller the money, (Tr. 49), not that Sleyko participated or even was in a position to observe. Miller's testimony as to receiving the money does not place Sleyko on the scene. (Tr. 90-92)

Facts re Refused Instruction on Defendants' Theory of the Case

In the context of this trial, which raised serious questions as to "possession," (see facts set out at pp. 5-10, *supra*), defendant requested that the court instruct per Def. Inst. F, as follows:

> "To 'possess' means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature." (Def. Inst. F; R. 54; refused, Tr. 269-70)

Noting that counsel could so argue to the jury, (Tr. 269), thus taking the position that this was proper subject for argument but not for instruction, (Tr. 270), the court refused so to instruct. (Tr. 269-70)

Facts re Motion to Dismiss (Supervisory Power)

The defense moved to recall Patrick Wright to the stand after information came to light that he was on probation to the federal court in Illinois, the rules of which were known by government counsel to include a proviso against

the government's using a probationer in criminal investigation activities without permission of the judge or the probation department. (Tr. 145-50) The court denied the motion, (Tr. 151-53), but directed the government to produce a copy of its letter containing information about Wright's prior record which defense counsel claimed was tendered too late to be of assistance. (Tr. 153-54; see Tr. 148-50.)

Shortly thereafter, defense counsel ascertained that Wright's probation officer had moved to have his probation revoked in the Northern District of Illinois, for, *inter alia*, having participated in DEA undercover activities in violation of his probation order. Accordingly, defendants moved to dismiss the indictment under the court's supervisory power, (R. 63), incorporating in the written motion a Special Probation Report (Ex. A to R. 63) contained in the court files in the District Court for the Northern District of Illinois, No. 78 CR 641. In this report, Wright's Probation Officer, Sandra J. Mentus, specifically refers to the court's directive that Wright "not participate in any ongoing investigations in Florida." (R. 63, pp. 1-2) Based on this Report, the Asst. U.S. Attorney in the Northern District of Illinois moved that Wright's probation be revoked.[4] (Ex. B to R. 63)

The trial court denied the motion. (R. 71)

Facts re Motion to Dismiss
(unconstitutionality of statutes as applied)

In Counts 1 and 2, defendants were charged with possession of marijuana with intent to distribute, and conspiracy so to do, in violation of 21 U.S.C. §§ 841(a)(1) &

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[4] See fn. 9, p. 24, *infra*.

846, respectively. There was no allegation in the indictment, nor was there any evidence at trial, that the marijuana had been illegally imported from outside the United States, or even that it had been in interstate commerce.

Defendants moved to dismiss Counts 1 and 2, asserting that the sections are unconstitutional as applied to the facts herein, in that there is no proper basis for federal jurisdiction. (R. 19) The court denied the motion. (R. 47)

Facts re Denial of Meaningful Appellate Review

Though both parties thoroughly briefed and argued the issues presented herein, in the appeal in the Court of Appeals for the Fifth Circuit, that court did not issue any opinion, but rather merely affirmed summarily per an unpublished order rendered pursuant to a Circuit Rule 25. (App. A)

REASONS FOR GRANTING THE WRIT

1. **The decision below seriously erodes the due process standards relative to the government's burden to prove every element of the offense beyond a reasonable doubt, In Re Winship, 397 U.S. 358, by affirming defendants' convictions for "possession" and "conspiracy" upon evidence insufficient as a matter of law to establish essential elements of the offenses. Certiorari should be granted to clarify the applicability of Jackson v. Virginia, 443 U.S. 307, to federal convictions, and so this Court may speak to the evidentiary requirements of "possession" and "conspiracy" within the due process framework.**

Under the due process standard recently set out by this Court in *Jackson* v. *Virginia*, 443 U.S. 307, 61 L.Ed.2d 560 (1979), incorporating principles expressed in *In Re Winship*, 397 U.S. 358, 361-64, 25 L.Ed.2d 368, 373-75 (1970), a conviction cannot stand if, taking the evidence most favorably to the government, no reasonable jury could have found defendants guilty as to each element of the offense. 443 U.S. at 324, 61 L.Ed.2d at 576-77. While *Jackson* itself dealt with the standards to be applied by a federal court when evaluating the sufficiency of the evidence to support a State conviction under due process criteria, the test therein set forth must minimally be met before a federal conviction may be upheld against the same defense contention—that is, that the evidence is insufficient. per due process standards, to prove one or more of the substantive elements of the offense. See, *e.g.*, *United States* v. *Tranowski*, 659 F.2d 750 (7 Cir. 1981), applying (without discussion) the *Jackson* standard to a federal conviction, and, finding the admissible evidence insufficient, reversing.

Here, the sufficiency of the prosecution's case as to each of the Counts is challenged. As to Count 1, the evidence establishes that the government at all times exercised such control over the marijuana (which it had provided) that it cannot be said that either defendant "possessed" it; thus, even taking all the evidence presented by the government as factually correct, there is a complete failure of proof of possession, an essential element of the offense charged in Count 1.

As to Count 2, conspiracy, because both Wright and Miller were government agents, neither of them could be a part of the conspiracy charged. The only possible conspiracy, then, would be between Kretchmar and Sleyko, and, upon the evidence, Sleyko is not a conspirator. Thus there is no one for Kretchmar to conspire with, and Count 2 must fail.

A. Count 1. Due to the degree of control exercised over the marijuana by the government, which supplied it, neither defendant ever "possessed" the contraband.

At no time did either defendant have control of the alleged contraband, for the agents and police were at all times in control of the area, the car and its contents. (Tr. 43-45; 48; 79-82; 84; 88-93; 97; 101-02; 104-06; 110; 112; 157; 163) Accordingly, neither defendant "possessed" the substance within the legal meaning of the term, "possession." See Statement of Facts, pp. 5-10, *supra*.

Demonstrating the total control the agents had over the car and its contents, consider the following testimony:

> Q. [By defense counsel]: You never intended to let that 230 pounds or 234 pounds get out of your control, did you?—Even if you had the money, isn't that true?
>
> A. [Agent Miller]: As far as my control, we had no intentions of letting anybody take that car that it was in and leaving with it, no, sir." (Tr. 105-06)

Miller testified they would need 8 to 10 surveillance agents on the street because they weren't about to let Kretchmar were covered from the TraveLodge parking lot; with a get away with 234 pounds of marijuana. (Tr. 101) All exits 10-foot fence all the way around, there was no way out. (Tr. 97)

These facts negate possession by defendants. *United States* v. *Hernandez,* 290 F.2d 86, 90 (2 Cir. 1960); *United States* v. *Curzio,* 170 F.2d 354, 357 (3 Cir. 1948) ("Possession involves *power to control* and intent to control." [Emphasis added.]); *United States* v. *Landry,* 257 F.2d 425 (7 Cir. 1958). In *Landry,* although defendant admitted ownership of the contraband, possession was undisputably in his lady friend. The reviewing court reversed for lack of proof of possession. The *Landry* court adopted the definition of "possession" as stated in *United States* v *Wainer,* 170 F.2d 603, 606 (7 Cir. 1948), that " 'to "possess" means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature.' " 257 F.2d at 431. *Accord, Arellanes* v. *United States,* 302 F.2d 603, 606 (9 Cir. 1962) (possession involves "dominion and control . . . so as to give power of disposal"), quoted with approval in *United States* v. *Batimana,* 623 F.2d 1366, 1369 (9 Cir. 1980). In each of the above cases, the reviewing courts reversed convictions for possession, absent sufficient evidence of the defendant's power to control the substance.

In the case at bar, the evidence demonstrates unequivocally that neither defendant had actual dominion or control, because the agents were at all times totally in control of the alleged contraband.

This is a situation where, though (arguably) defendants may have intended to violate the law, in fact they were unable so to do because of the circumstances. A similar situ-

ation, involving "impossibility in fact" to commit a crime, arose in *Morissette* v. *United States*, 342 U.S. 246 (1952). There, this Court reversed defendant's conviction for theft of government property, holding that defendant could not be guilty if the property was in fact abandoned, even though he had removed the personal property from government property without anyone's permission. Likewise here, where the agents' actual control over the contraband rendered it impossible in fact for defendants to be in "possession."

Cf. a recent case reversing for impossibility in fact, *United States* v. *Dove*, 629 F.2d 325 (4 Cir. 1980), where defendant thought he bought a stolen car from FBI agents. The reviewing court held the car lost its character as "stolen" by virtue of the FBI's control over it. An undercover operative bought the stolen car from a car thief and then sold it to defendant, who knew the car had been stolen. The court held that when the operative bought the car, the FBI gained exclusive control and possession of it; hence, the vehicle had been "recaptured" by the FBI, which functionally held it as trustee for the true owner; the car therefore no longer remained "stolen," and defendant's conviction was reversed.

At bar, the deficiency in the proof was aggravated by the court's refusal to instruct the jury upon defense request as to the nuances of "possession". See Point 2, *infra*.

This is one of those rare cases where the reviewing court should reverse for the trial court's failure to direct a verdict for the defendants. See *Hinton* v. *United States*, 196 F.2d 605 (D.C. Cir. 1952).

* * *

Absent proof of possession by defendants, in the face of the undisputed evidence demonstrating continuous control by the agents, defendants' convictions upon Count 1 should be reversed. *Jackson* v. *Virginia, supra.*

B. Count 2. There was no proof that Sleyko engaged in a conspiracy with Kretchmar. Since both Wright and Miller were government agents, legally incapable of conspiring, there is a failure of proof as to conspiracy.

From the outset, the trial court agreed with the defense position that no government agent, overt or covert, could be a conspirator. (See Tr. 32; Def. Inst. C, given by the court, Tr. 335.) *United States* v. *Morello*, 250 F.2d 631, 634 (2 Cir. 1957); *United States* v. *Chase*, 372 F.2d 453, 459 (4 Cir. 1967). From the evidence, the "cast of characters" consisted entirely of four persons: Pat Wright, undercover agent; DEA Agent Lowell Miller; and the two defendants. Eliminating Wright and Miller, the only remaining possible conspirators are the two defendants.[5]

The evidence does not make Sleyko out to be a conspirator. At best, all he did was fly from Chicago to Tampa under a fictitious name, (Tr. 218), and agent Miller testified that he showed Sleyko the bales in the car. (Tr. 90) Period. But the bales were not open—Kretchmar had had to slit one open to get the sample (Tr. 84)--and there is no evidence that Sleyko ever knew what was in the bales in the car.[6] There is no hard evidence he was aware that

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[5] Although Count 2 alleged that defendants conspired "with each other and with other persons to the Grand Jury unknown." (R. 6), on defense motion (R. 50; Tr. 3), the government conceded there were no such other persons. (Tr. 3)

[6] The bales were contained in opaque brown or black plastic bags. See Tr. 244.

the money was passed (see Tr. 245-46). What Miller actually said is that Sleyko was in the room when Kretchmar gave Miller the money (Tr. 49), not that Sleyko participated or even was in a position to observe. And Miller's testimony as to receiving the money does not place Sleyko on the scene. (Tr. 90-92)

There is no evidence Sleyko ever said anything.

The gravamen of conspiracy is an agreement to violate the law. Here, the evidence is insufficient to establish any such agreement between the two defendants. The evidence does not admit the conclusion that Sleyko, being aware of the supposed scope of any joint enterprise, knowingly participated therein. *Ingram* v. *United States*, 360 U.S. 672, 3 L.Ed.2d 1503 (1959); *United States* v. *Falcone*, 311 U.S. 205, 85 L.Ed. 128 (1940); *United States* v. *Peoni*, 100 F.2d 401 (2 Cir. 1938); *Dennis* v. *United States*, 302 F.2d 5, 12 (10 Cir. 1962); *United States* v. *Turnipseed*, 272 F.2d 106 (7 Cir. 1959). See also *United States* v. *Nettles*, 570 F.2d 547, 552-53 (5 Cir. 1978), where the court reversed upon lack of non-hearsay evidence to link defendant with a conspiracy; and *United States* v. *Annoreno*, 460 F.2d 1303, 1309-10 (7 Cir. 1972) (reversing; "Proof of knowledge on the part of a participant in an alleged conspiracy is an essential element of the offense.") In *Dennis, supra*, the reviewing court reversed as to all defendants, remanding some for a new trial, stating:

> "Without knowledge, the intent to participate in a . . . conspiracy cannot exist, and '* * * to establish the intent, the evidence of knowledge must be clear, not equivocal.' *Ingram* v. *United States*, 360 U.S. 672, 680 . . ." 302 F.2d at 12.

Finally, it must be remembered that the government's proof may not be furnished by mere speculation or con-

jecture. In *United States* v. *Diggs*, 527 F.2d 509, 513 (8 Cir. 1975), the court, reversing, said:

> "While the facts proved by the government were certainly suspicious, a jury is not justified in convicting a defendant on the basis of mere suspicion, speculation or conjecture."
>
> * * *

Absent proof that Sleyko knowingly participated in any conspiracy with Kretchmar, there is a total failure of the evidence to prove the most essential element of Count 2, and defendants' conspiracy convictions should therefore be reversed. *Jackson* v. *Virginia, supra.*

Conclusion

Even taking all the evidence most favorably to the government, here the evidence establishes that the government at all times exercised such control over the marijuana (which it had provided) that it cannot be said that either defendant ever "possessed" it, within the legal meaning of the word. Thus, there is a complete failure of proof of possession, an essential element of the offense charged in Count 1.

Concomitantly, taking all the evidence most favorably to the government, there is a failure of proof of conspiracy, for the reasons above set forth.

Certiorari should be allowed so that this Court may clarify the applicability of the *Jackson* v. *Virginia* due process standard to federal criminal trials, and to permit this Court to speak to the evidentiary requirements of proving "possession" and "conspiracy" within the due process framework. And, on the merits, for insufficiency of the evidence, the convictions should be reversed.

2. The decision below, approving the trial court's refusal to instruct on defense request as to defendants' theory of the case, condones deprivation of defendants' Sixth Amendment and due process right to have the jury instructed on the defense theory, where the evidence presented (at best) a close factual situation whether defendants ever "possessed" the marijuana, considering the continuous degree of government control. Certiorari should be allowed so that this Court may address itself to the defendant's constitutional right to instructions on the defense theory of the case, an important issue in the administration of criminal justice, and one to which this Court apparently has not spoken.

This Court has recognized that the right to present evidence on one's own behalf is an ingredient of due process of law. *Chambers* v. *Mississippi*, 410 U.S. 284, 35 L.Ed.2d 297 (1973); *Washington* v. *Texas*, 388 U.S. 14, 18 L.Ed.2d 1019 (1976); *cf. Holt* v. *Virginia*, 381 U.S. 131, 136, 14 L.Ed.2d 290, 293 (1965). Where, as here, a defense theory is supported by the evidence, the jury must be instructed upon that theory. *United States* v. *Vole*, 435 F.2d 774 (7 Cir. 1970); *United States* v. *Grimes*, 413 F.2d 1376 (7 Cir. 1969); *Levine* v. *United States*, 261 F.2d 747 (D.C. Cir. 1958); *United States* v. *Phillips*, 217 F.2d 435 (7 Cir. 1955).

The defendant's due process right to have the jury instructed on his theory of the case has been recognized, as such, in the foregoing Courts of Appeals decisions; however, while this Court has advanced the position that the right to present a defense encompasses the right to be heard, *Holt* v. *Virginia, supra*, it appears Your Honors never have expressly dealt with the due process requirement that the jury be instructed on a defendant's theory of the case.

• • •

Here, the crux of the defense was that the defendants never "possessed" the substance, for it was always within the absolute dominion and control of the government agents. (See pp. 10 & 15-17, *supra.*) Yet, counsel's argument to the jury was without judicial sanction by way of instructions as to the strict legal definition of "possession" as applied to the evidence and facts of this case. The court refused to instruct per Defendant's Requested Instruction No. F, as follows:

> "To 'possess' means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature." (Def. Inst. F; R. 54; refused, Tr. 269-70.)

The court noted that counsel could so argue to the jury, (Tr. 269), taking the position that this was proper subject for argument but not for instruction. (Tr. 270)[7] But,

> "An argument to a jury, however, on a legal issue, unsupported by instruction to which the defendant was entitled, constitutes an aggravation rather than a mitigation of the harmful effect of the court's refusal to instruct." *United States* v. *Phillips, supra,* 217 F.2d at 440.

The refused instruction properly stated the law. *United States* v. *Wainer,* 170 F.2d 603, 606 (7 Cir. 1948); *United*

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[7] Compounding the error of refusing to instruct per Def. Inst. F, the court also improperly refused to instruct per Def. Inst. G, concerning "knowingly" and "intentionally," (R. 54; denied, Tr. 274-75), again suggesting that defense counsel may so argue. (Tr. 54; denied, Tr. 274-75). Similarly, defendants' requested instruction on "specific intent," (Def. Inst. A, R. 54), was improperly refused. (Tr. 267)

States v. *Landry*, 257 F.2d 425, 431 (7 Cir. 1958); *United States* v. *Hernandez*, 290 F.2d 89, 90 (2 Cir. 1961). Pursuant to the rationale of *Phillips, supra*, recently restated in *United States* v. *Vole, supra*, defendants were deprived of a fair trial, upon these facts, by the court's refusal to instruct as to the applicable law concerning defendants' theory of the case.

* * *

Certiorari should be allowed so that this Court may address itself to the defendants' constitutional right to instructions on the defense theory of the case, an important issue in the administration of criminal justice, and one to which this Court apparently has not spoken. On the merits, here, where the evidence, if not insufficient as argued above, is at most extremely tenuous as to possession by defendants, the trial court's failure to instruct per defense request as to "possession" deprived defendants of their due process right to have the jury instructed on the defense theory of the case. The convictions should therefore be reversed[8] and remanded with appropriate directions.

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[8] Although this argument specifically is directed to the possession count (Count 1), it is impossible to say that the conspiracy Count 2 was not contaminated by the unfairness, since the evidence on the two counts is so intertwined. Thus, if reversal and remand is in order as to Count 1, the same result should also obtain as to Count 2.

3. **The decision below, by affirming the trial court's order denying defendants' motion to dismiss the indictment in the exercise of its supervisory powers to deter the flouting of court orders, approves a conviction based on testimony of a principal government witness who was in violation of his probation by participating with the DEA in Florida. Certiorari should be allowed so that this Court may exercise its supervisory powers in the spirit of principles of the Olmstead dissent (277 U.S. 438, 470, 485), adopted in McNabb v. United States, 318 U.S. 332 and reiterated in such cases as Elkins v. United States, 364 U.S. 206, concerning "the imperative of judicial integrity," id. at 222, to maintain proper respect for the judicial system.**

The facts pertinent to this Point are set out at pp. 11-12, *supra*.

Because Wright was under court order as a probationer[9] not to engage in informant activities for the DEA, and because he was paid "by the case" on each case in which he participated as an informant, see *Williamson* v. *United*

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[9] Wright's activities in the instant case began *after* he was placed on probation with the mentioned condition against undercover work. See R. 63, p. 2, par. 3. When the Asst. U.S. Attorney moved to revoke Wright's probation, Judge John Powers Crowley, supervising Wright's probation in the Northern District of Illinois, did not revoke his probation. See Ex. A to R. 69, government's response. But despite Judge Crowley's reluctance to revoke Wright's probation where there appeared to have been a "failure in communication" as to the non-informant probationary condition, at issue is the state of mind, not so much of Wright himself, but, rather, that of the agents who knowingly used his services in violation of the terms of his probation. It is against this *official* flouting of the law that the defense motion was directed.

States, 311 F.2d 441, 444-45 (5 Cir. 1962), the trial court should have exercised its supervisory power to dismiss the indictment. Since the lower court erred in failure to allow this motion, this Court should act accordingly and itself exercise its supervisory power to maintain proper respect for the integrity of the judicial system.

The doctrine expressed in the famous dissenting opinions of Mr. Justices Holmes and Brandeis in the *Olmstead* case has become the prevailing view. That dissent has been characterized, in *Elkins* v. *United States,* 364 U.S. 206, 222, 4 L.Ed.2d 1669, 1680 (1960), as dealing with "the imperative of judicial integrity." In *Olmstead* v. *United States,* 277 U.S. 438 (1928), the dissenting Justices had this to say:

> [Holmes] "For those who agree with me, no distinction can be taken between the government as prosecutor and the government as judge." 277 U.S. at 470.
>
> [Brandeis] "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of justice the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." *Id.* at 485.

In *Elkins, supra,* this Court recognized that the basic principle of the *Olmstead* dissents was accepted in *McNabb* v. *United States,* 318 U.S. 332 (1943), wherein the Court held that "a conviction resting on evidence secured through

such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law." 318 U.S. at 345, quoted in *Elkins, supra,* 364 U.S. at 223.

While in the instant case, no Act of Congress has been flouted, we submit the same result should obtain where, as here, a federal district court's order was not only violated by the probationer—the violation was procured by the wilful activity of DEA agents who enticed him (for sums of money) to violate the court's order. (See fn. 9, p. 24, *supra.*)

In *McNabb, supra,* this Court held, in the exercise of its supervisory power:

> "The principles governing the admissibility of evidence in Federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, see Nardone v. United States, 308 U.S. 338, 341, 342, 84 L.Ed. 307, 311, 312, 60 S.Ct. 266, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in Federal criminal prosecutions. . . . And in formulating such rules of evidence for Federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance." 318 U.S. at 341.

Accord, Mallory v. *United States,* 354 U.S. 449 (1957), applying the *McNabb* rule to confessions obtained in violation of F.R.Cr.P. 5(a) requiring prompt arraignment.

The gist of such use of supervisory power is deterrence —that is, to discourage violation of the law by law enforcement personnel by removing the incentive to disregard it. See *Mallory, supra,* 354 U.S. at 453. "In order adequately

to enforce the congressional requirement of prompt arraignment, it was deemed necessary to render inadmissible incriminating statements elicited from defendants during a period of unlawful detention." And in *Elkins, supra,* in characterizing the exclusionary rule (requiring suppression of evidence obtained in violation of the Fourth Amendment), this Court said:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way —by removing the incentive to disregard it." 364 U.S. at 217.

In *Williamson* v. *United States, supra,* reversing because of the use of a forbidden contingent fee (bounty hunter) informer, the reviewing court held:

> "Under the principles settled in *McNabb* v. *United States,* 1943, 318 U.S. 332, 340, 63 S.Ct. 608, 87 L.Ed. 819, and its progeny, however, it becomes the duty of the courts in federal criminal cases to require fair and lawful conduct from federal agents in the furnishing of evidence of crimes." 311 F.2d at 444.

The following language from a concurring opinion in *Williamson, supra,* says it best:

> "What we hold is that, recognized as is the role of informer in the enforcement of criminal laws, there comes a time when enough is more than enough—it is just too much. When that occurs, the law must condemn it as offensive whether the method used is refined or crude, subtle or spectacular." 311 F.2d at 445. (Concurring opinion of Judge Brown)

* * *

Certiorari should be allowed to give this Court an opportunity to reiterate "the imperative of judicial integrity", in the interest of maintaining proper respect for the judicial system.

Because government agents knowingly importuned Patrick Wright and exploited his vulnerable position in violation of a federal court order that Wright not engage in undercover activities in Florida, the trial court should have granted the motion to dismiss. Accordingly, certiorari should be allowed.

4. The decision below improperly upholds the trial court's ruling refusing to dismiss the indictment on grounds the statutes [21 U.S.C. secs. 841(a)(1) & 846] as applied to the facts are unconstitutional, in that there is no proper basis for federal jurisdiction. Certiorari should be allowed to permit this Court to speak to the constitutionality of Title 21 insofar as it applies to offenses involving marijuana, absent proof of illegal importation or interstate commerce, in light of the prior statements of this Court in Leary v. United States, 395 U.S. 6, with respect to the recognized fact that large quantities of marijuana are domestically grown.

In Counts 1 and 2, defendants were charged with possession of marijuana with intent to distribute, and conspiracy so to do, in violation of 21 U.S.C. § 841(a)(1) & 846, respectively.

Defendants moved to dismiss these two counts, asserting that the sections are unconstitutional as applied to the facts herein, in that there is no proper basis for federal jurisdiction. (R. 19) The court denied the motion. (R. 47)

Counts 1 and 2 should have been dismissed. Each count sets out an alleged violation with respect to marijuana. There is no allegation or evidence that the marijuana had

been illegally imported from outside the United States, nor, for that matter, that it had been in interstate commerce. For all the Record shows, the marijuana the government had in Florida may have been grown in Florida.

As applied to marijuana, the Act (Title 21) is unconstitutional as a violation of the Tenth Amendment to the Constitution, *viz.:*

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Absent a specific delegation to the federal government—as here, there is none—and absent invocation of the federal commerce power, as where the prohibited activity involves interstate or foreign commerce—as here, there is none—the mere possession of marijuana is outside the scope of federal jurisdiction.

The federal government possesses no inherent power, but only has such power as is provided by the Constitution itself. *United States* v. *Solomon,* 419 F.Supp. 358 (D. Md. 1976), *aff'd,* 563 F.2d 1121 (4 Cir. 1977).

There must be a rational connection between the act legislated against and the allegation in the indictment to show a nexus of federal jurisdiction. Here, there is none, any more than was shown in *Leary* v. *United States,* 395 U.S. 6 (1969). In *Leary,* this Court reversed a conviction for possession of marijuana knowing it to have been imported into the United States, under a statute which provided that a person in possession was presumed to know that the marijuana was imported into the United States, merely from the fact of possession. The Court unanimously struck down the conviction, holding that there was no

rational connection between the fact of possession and the presumption of knowledge of importation.[10]

Leary, supra, demonstrates that marijuana is indigenous to the United States; moreover, this Court should take judicial notice that large quantities of marijuana are grown in the State of Florida. As the Court stated in *Leary:*

> "It must also be recognized that a not inconsiderable proportion of domestically consumed marijuana appears to have been grown in this country, and that its possessors must be taken to have 'known', if anything, that their marijuana was *not* illegally imported. In short, it would be no more than speculation were we to say that even as much as the majority of possessors 'knew' the source of their marijuana." *Id.* at 52-53.

For the foregoing reasons, absent a federal jurisdictional nexus—which here does not exist—application of the sections in question to defendants for their alleged conduct with respect to a quantity of the plant, marijuana, is unconstitutional.

The trial court should have dismissed Counts 1 and 2. This Court should grant certiorari and reverse defendants' convictions.

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[10] *Cf.* the following cases, all of which were cited and relied on in *Leary, supra: Marchetti* v. *United States,* 390 U.S. 39 (1968); *Grosso* v. *United States,* 390 U.S. 62 (1968); *Haynes* v. *United States,* 390 U.S. 85 (1968); *Tot* v. *United States,* 319 U.S. 463 (1943).

5. By affirming defendants' convictions without opinion, in the face of the foregoing serious and viable issues, the Court of Appeals has deprived defendants of their right to meaningful appellate review. This Court should grant certiorari to discourage such short shrift being given to non-frivolous criminal appeals.

Pursuant to an Eleventh Circuit Rule 25 the Court of Appeals affirmed defendants' convictions without opinion. Each of the serious, viable issues presented in this Petition for Certiorari was raised in the appeal and argued to the Court.

The due process right to a fair trial necessarily encompasses the right to meaningful appellate review, else the right to a fair trial is rendered meaningless in practice.

In order to discourage the increasingly prevalent practice of federal reviewing courts disposing of appeals without opinion, this Court should grant certiorari, and, at the very least, reverse and remand the cause to the Eleventh Circuit with directions that that court render an intelligible opinion disposing of the issues presented on appeal.

Conclusion

For the foregoing reasons, the Petition for Certiorari should be allowed. And, on the merits, the cause should be reversed for insufficiency of the evidence; alternatively, the cause should be reversed and remanded with appropriate directions.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 81-5245

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

JOHN FRANCIS KRETCHMAR and
FRANK RICHARD SLEYKO,

Defendants-Appellants.

Appeal from the United States District Court for the
Middle District of Florida

(October 28, 1981)

Before FAY, ANDERSON, and CLARK, Circuit Judges.
PER CURIAM: AFFIRMED. See Circuit Rule 25.

OP-JDT-9